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International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances
Tenth session
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Item 6 of the provisional agenda
Consideration of reports of States parties to the Convention

List of issues in relation to the report submitted by Tunisia under article 29, paragraph 1, of the Convention

Addendum

Replies by Tunisia to the list of issues*

[Date received: 1 December 2015]

Introduction

Action taken to respond to the issues raised by the Committee on Enforced Disappearances

1. In response to the letter from the Office of the United Nations High Commissioner for Human Rights (OHCHR) concerning the issues raised by the Committee on Enforced Disappearances, the minister responsible for liaison with constitutional bodies and civil society and for human rights issues established a committee to reply to the list of issues (CED/C/TUN/Q/1). The committee was composed of representatives of the Office of the President, the Ministry of Justice, the Ministry of Defence, the Ministry of the Interior, the Ministry of Foreign Affairs and the Ministry of Health, the Truth and Dignity Commission and the High Committee for Human Rights and Fundamental Freedoms.

2. This committee prepared the replies of Tunisia to the various issues raised and discussed the issue of enforced disappearance with civil society representatives at a round-table event held on 26 November 2015 and organized by the minister responsible for liaison with constitutional bodies and civil society.

3. Civil society representatives present at the event highlighted the progress made since Tunisia acceded to the Convention and emphasized the need to establish a national legal framework addressing enforced disappearance, either by amending the existing criminal legal framework or by opting for a stand-alone law specifically

* The present document is being issued without formal editing.

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making enforced disappearance a crime, in accordance with the provisions of the Convention.

I. General information

4. Tunisia intends to make the declarations provided for in articles 31 and 32 of the Convention, which relate to the Committee's competence to receive and consider individual and inter-State communications. The Government has initiated the procedures for these declarations, which require the approval of the Council of Ministers and the Chamber of Deputies.

5. The provisions of the Convention can be directly invoked before the courts or other relevant authorities, but a major training effort is required to familiarize judges and lawyers with human rights conventions. The Ministry of Justice, with support from the Office of the United Nations High Commissioner for Human Rights (OHCHR), has already organized training sessions for this purpose. Another exercise to raise awareness of these conventions is being organized by the national committee responsible for preparing human rights-related reports and following up on recommendations, which was established by Government Decree No. 1593 of 30 October 2015.

6. Article 128 of the Constitution provides for the establishment of an independent, constitutional body, referred to as a "human rights institution", to monitor respect for freedoms and human rights and to investigate human rights violations with a view to finding remedies or to refer them to the competent authorities. The office of the government minister responsible for liaison with constitutional bodies and civil society is drafting a bill to govern this new institution in compliance with the new Constitution and the Paris Principles. The committee drafting the bill has already sought the views of national and international experts and the draft will also be submitted to civil society organizations for consultation. It will be finalized in early 2016. The High Committee for Human Rights and Fundamental Freedoms has not received any complaints related to enforced disappearances.

II. Definition and criminalization of enforced disappearance (arts. 1-7)

7. Derogations from certain rights are possible pursuant to article 49 of the Constitution, which stipulates that: "The law shall specify the limitations on the rights and freedoms guaranteed by this Constitution and the limitations on the exercise of such rights and freedoms in a manner that does not impinge upon their substance. Such limitations may be imposed only when deemed necessary by a civil democratic State to protect the rights of others or for the purposes of public security, national defence, public health, or public morals. The judicial authorities shall ensure that rights and freedoms are protected from any violation. No amendment that prejudices any human rights or freedoms guaranteed in this Constitution shall be permitted".

8. The Government has requested the withdrawal of all the corresponding provisions of the proposed bill on enforced disappearance mentioned in the report. It has undertaken to draft a new bill that is more closely aligned with the Convention and that takes account of the comments made by the Committee on Enforced Disappearances. The bill referred to in the report has been submitted neither to the Council of Ministers nor to the Assembly. Following the round-table event on enforced disappearance, the Government plans to create a new committee to prepare a new bill that will be submitted to civil society and the independent bodies concerned

for consultation. For this reason the Government will not respond to the questions related to the proposed bill.

III. Judicial procedure and cooperation in criminal matters (arts. 8-15)

9. In Organizational Act No. 53 of 24 December 2013 on the establishment and organization of a system of transitional justice, Tunisian lawmakers defined enforced disappearance as a serious human rights violation requiring a specific set of procedures under which the search for the truth is not limited to identifying the causes and consequences of the offence but extends also to ascertaining the fate of the victims, and identifying the perpetrators and those responsible for the offences, meaning that cases of enforced disappearance, when unresolved, extend over a considerable period of time and cannot be subject to standard time-barring rules until such time as the truth about the offence has been determined in full. Consequently, cases of enforced disappearances that took place before 1955 may fall under the jurisdiction of the Truth and Dignity Commission if the circumstances of the offence have not yet been ascertained.

10. Article 305 of the Code of Criminal Procedure allows Tunisian courts to exercise jurisdiction over Tunisian nationals alleged to have committed enforced disappearances in countries which have not criminalized enforced disappearance as an autonomous offence. The article states that: "A Tunisian citizen may be prosecuted and brought to trial before the Tunisian courts for an offence committed outside Tunisia that is punishable under Tunisian law, unless the offence is not punishable in the country where it was committed or the defendant can show that a final judgement has been handed down on the offence in another country and, if the person has been convicted, that the defendant has served the sentence or that the offence is time-barred or the defendant has been pardoned. These provisions also apply to persons who only acquire Tunisian nationality after the act in question has been committed".

11. As stated in the introduction to the initial report of Tunisia, domestic criminal law does not define acts of enforced disappearance as an autonomous criminal offence. However, the responsibilities of military authorities will of course be covered in the bill on enforced disappearance which is due to be drafted.

12. The authorities in charge of investigating potential cases of enforced disappearance have immediate, unannounced access to any place of deprivation of liberty, as established in the law regulating the national mechanism for the prevention of torture and the bill regulating the human rights institution. Civil society associations and NGOs too have access to places of deprivation of liberty, in accordance with agreements signed with the Ministry of Justice and the Ministry of the Interior.

13. In cases where the alleged perpetrators of an enforced disappearance are public officials, in accordance with the principles of equality and non-discrimination in the application of the law, all persons who have committed or participated in the offence will be brought to justice, even if they are members of the national security or military services. Thus, status as a member of the military or as a security officer does not exclude a person from criminal responsibility for any acts of enforced disappearances that person may have committed. Members of the military are not exempted from criminal responsibility and, if accused of an offence under ordinary law or military law (with the exception of terrorist offences), will be brought before the military courts, notwithstanding the fact that the Convention on the Protection of All Persons from Enforced Disappearance confers exclusive jurisdiction for such cases to the civil

courts, to the express exclusion of military courts. The bill currently being drafted should include legal provisions along those lines.

14. The committee attached to the Ministry of Justice which is responsible for the amendment of the Criminal Code is currently reviewing the mechanisms which protect complainants, witnesses and relatives against all forms of intimidation.

15. The Truth and Dignity Commission has investigated the three cases of enforced disappearance mentioned in paragraph 44 of the State party report, the details of which are as follows:

(a) The case of Kamel Matmati, born in 1956 in Matmata, Gabès Governorate, who disappeared in Gabès on 8 October 1991. The authorities refused to disclose any information about his fate for years, until a judicial investigation was opened in 2012. The case was referred to the investigating judge of Gabès Court of First Instance after a complaint was lodged by the victim's wife under inquiry No. 3/361. According to the preliminary investigation, witnesses claim to have seen the victim die as a result of torture after being arrested and kidnapped by the police. As of the present date, the place in which he is buried remains unknown. The first ruling issued by Gabès Court of First Instance dismissed the charges against those accused on the grounds that proceedings were time-barred. The family launched an appeal before Gabès Court of Appeal, which, in judgement No. 5959 of 21 May 2013, overturned the first instance ruling, finding that the acts committed by the accused constituted an offence of unlawful detention which was followed by violence, threats and death. The accused have been referred to Gabès Criminal Chamber for trial on this basis. It should be noted that, on 20 May 1992, by decision of the Court of Appeal, the victim had been sentenced to 17 years' imprisonment and 4 years' administrative supervision for membership of an illegal association, even though he was in fact already dead. Based on the findings of the investigation, and following decision No. 43667 of Gabès Court of First Instance of 7 May 2015, the family was able to obtain a death certificate for the victim;

(b) The case of Fathi Louhichi, born in 1960 and originally from El Hamma, Gabès Governorate, who disappeared following his arrest by the intelligence brigade operating in the Gabès region on 25 November 1996. No information about his whereabouts has so far come to light. The family has filed complaints with all competent authorities, to no avail. A complaint was filed before Gabès Court of First Instance by the victim's wife on 18 February 2008. The case has been referred to the National Guard in El Ouina for investigation into the victim's whereabouts;

(c) The case of Walid Hosni, born in 1987 and originally from Tala, Gabès Governorate, who disappeared on the morning of 30 September 2009, leaving all his personal belongings at home. No trace of the disappeared person has been found to date. Several complaints have been brought before the competent judicial and administrative authorities, to no avail. The case was assigned to the investigating judge of the Ben Arous Court of First Instance, who referred it to the Fouchana investigation brigade. Several complaints have been registered and the family has been received on numerous occasions. The Truth and Dignity Commission has begun hearing the parties in these cases and has initiated investigative inquiry proceedings.

16. The Truth and Dignity Commission has received a number of complaints related to enforced disappearances, including the cases of Mohamed Adlene Taktak, who has been missing since 23 September 2006, and of Ahmed Mhamed Ben Mohamed Lazrag, missing since 20 August 1986. The Commission has also received two cases in which Tunisian nationals have disappeared abroad, including the case of Mohamed Ben Mustapha Allani, who disappeared in Switzerland on 22 July 2004. With regard to cases of collective enforced disappearance, the Commission has received a case

relating to the disappearance of a group of Tunisians and Algerians who, on the night of 8 October 2008, illegally crossed the maritime border at Annaba, in Algeria, in an attempt to reach Sardinia. The latest information about their disappearance suggests that they were apprehended by the Tunisian coast guard while attempting to cross to Italy, having taken a wrong direction. A number of petitions have been lodged with the Tunisian authorities in an attempt to ascertain the fate of the disappeared group. The provisional authority responsible for the oversight of judicial justice, at its annual general assembly on 13 November 2015, just appointed the various judges to preside over the specialized chambers on transitional justice in the different courts of first instance at courts of appeal.

IV. Measures to prevent enforced disappearances (arts. 16-23)

17. Tunisia does not yet have a national legal framework regulating the right to asylum. However, a bill on the right to asylum is currently being drafted and is in conformity with the principles established in the Convention of 28 July 1951 relating to the Status of Refugees. Since the crisis in Libya, the Office of the United Nations High Commissioner for Refugees (UNHCR) has been mandated to process asylum applications, in conjunction with the Tunisian authorities and certain national and international organizations.

18. The provisions of the Code of Criminal Procedure that deal with the rights of detainees in police custody are among those due to be amended by the committee tasked with the Code's revision. With regard to the compatibility of the new counter-terrorism law with the human rights instruments to which Tunisia is a party, article 2 of the new law provides that: "The public authorities responsible for applying this law shall respect constitutional guarantees and the international, regional and bilateral treaties ratified by the Republic of Tunisia in the field of human rights, the protection of refugees and international humanitarian law".

19. During the Libyan crisis, migrant centres and refugee shelters were managed by UNHCR, which kept the corresponding registries and records. All places of detention in Tunisia which are under the supervision of the Ministry of Justice, Ministry of the Interior or the Ministry of Health maintain very precise registries which contain all the necessary information.

20. The national mechanism for the prevention of torture has not yet been established, but the appointment process has begun. The Government is committed to ensuring that the mechanism has sufficient financial, human and technical resources to carry out its functions effectively. Article 13 of the law on the organization of the national preventive mechanism establishes that: "Periodic or unannounced visits to places of deprivation of liberty may be challenged by the authorities concerned only for urgent or compelling reasons related to national defence, public safety, natural disasters or serious disruption in the place to be visited that would temporarily prevent the visit from taking place. In such cases, a reasoned written decision, informing the chairperson of the mechanism and specifying the duration of the temporary ban, is required. Anyone who violates the aforesaid provisions shall be liable to disciplinary proceedings".

21. Relatives of persons deprived of their liberty have the possibility of accessing information during the custody period pursuant to article 13 bis of the Code of Criminal Procedure, which provides that: "The judicial police officer shall inform a parent, son, daughter or sibling or the spouse of the suspect, in accordance with the choice of the suspect, of any action taken against that person. The person in custody, or one of the persons mentioned in the preceding paragraph, may legally request a medical examination during or at the end of the custody period. The report drawn up

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by the judicial police officer shall indicate: that the suspect has been informed of the action taken and the grounds for taking it; that the suspect has been apprised of the guarantees available to him or her under the law; whether or not the family of the detained suspect has been notified; whether a request for a medical examination has been submitted by the suspect or a family member; the date and time of the start and end of the custody period; and the date and time of the start and end of the questioning period. The report must be signed by the judicial police officer and the person in custody; should the latter refuse to sign, the reason for the refusal must be mentioned. The judicial police officers referred to in the first paragraph of this article shall keep a special registry in places of police custody, with numbered pages signed by the public prosecutor or a person empowered to do so, which must contain the following information: the detainee's personal identification details; the date and time of the start and end of the custody period; whether family members have been informed of the action taken; and whether a medical examination has been requested by the detainee or by a parent, child or sibling or by the spouse".

V. Measures for reparation and protection of children from enforced disappearance (arts. 24 and 25)

22. With regard to the reparations programme, the Truth and Dignity Commission is working to identify the places in which victims' bodies have been buried and return their remains to their families, in spite of the difficulties in accessing information. The Commission is also in the process of defining the criteria, conditions and procedures required for the moral and financial reparation and temporary compensation of victims' families until a comprehensive reparations programme has been established. It is also working to preserve the nation's collective memory of human rights violations, including specifically the memory of the victims of enforced disappearance. In addition, the Commission organizes artistic, literary and cultural activities, for instance by publishing books, to pay tribute to these victims and has plans to create a memorial, to name public spaces for the victims and even to establish museums to ensure that such violations are never repeated.